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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JAMES PALMER KRAMER,<br><br>Defendant and Appellant. | D052520<br><br><br><br>(Super. Ct. No. SCE269305) |

APPEAL from a judgment of the Superior Court of San Diego County, Charles W. Ervin, Judge. Affirmed.

A jury convicted James Palmer Kramer of burglary (Pen. Code, § 459)[1] and petty theft (§ 484) of merchandise at a Home Depot store. The trial court sentenced Kramer to three years' formal probation with the condition, among others, that he serve 120 days in local custody.

Kramer contends that (1) the trial court erred in denying two of his motions in limine to exclude evidence; (2) the trial court improperly sustained certain hearsay

1 Unless otherwise specified, all further statutory references are to the Penal Code.

objections; (3) the trial court improperly instructed the jury with CALJIC Nos. 361 and 362; (4) defense counsel provided ineffective assistance of counsel; and (5) insufficient evidence supports the petty theft conviction. We conclude that Kramer has not identified any prejudicial error, and accordingly we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Kramer approached the special services desk at the Home Depot store in El Cajon, California, at around 6:15 p.m., on February 18, 2007. He told Home Depot employee Antonia Comfort that he wanted to return nine packages of insulation. Instead of giving Comfort a receipt, Kramer read her an order number from an organizer notebook that he carried with him (the organizer).

Using the order number, Comfort pulled up the order information on the computer and asked Kramer, "Is your name Alex Magana?" and "A&M Construction?" Kramer answered, "Yes." After a 10- or 15-minute delay for Comfort to obtain sufficient cash in her register to perform the refund, she processed the refund in the amount of $652, generating a refund receipt for Kramer indicating the time as 6:44 p.m. Comfort did not ask to check Kramer's identification, although it would normally be her policy to do so when refunding cash. After completing the refund, Comfort observed Kramer head into the store.

Home Depot loss prevention investigators John Hikade and Michael Silva were on duty that evening. As Silva saw Kramer walking through the store, Silva remembered that in approximately 2004 he had identified Kramer as purchasing an item bearing a

suspicious sticker with an incorrect price at a different Home Depot store. Silva pointed out Kramer to Hikade, and they began to observe Kramer's actions. At around 6:45 p.m., Silva and Hikade observed Kramer quickly select a boxed kitchen sink that cost $397 and place it in his cart. Kramer then traveled to the restroom and entered it, leaving his cart outside. While Kramer was in the restroom, Silva and Hikade looked more closely at the boxed sink in Kramer's cart and noticed that the UPC bar code associated with the item was printed directly on the box.

Kramer exited the restroom and pushed his cart out into the store's garden center. Silva and Hikade watched Kramer in the garden center as he opened his organizer, peeled off a four-inch square sticker from inside of it, and affixed the sticker over the UPC bar code on the box containing the sink. According to Silva and Hikade, Kramer was alone as he moved through the store, and they were both 100 percent sure that it was Kramer whom they observed placing the sticker on the box.

Kramer pushed his cart back inside the store where he put five bathroom vent fans and one drill into his cart. Kramer proceeded to the cash register, and Hikade and Silva observed from a distance of five to 15 feet as Kramer purchased the items in his cart. The cashier determined the price of the sink by using the UPC bar code on the box. Kramer paid for his purchases by using a store credit that he took out of the organizer.

As soon as Kramer left the register, Silva and Hikade obtained a duplicate receipt from the cashier, from which they learned that Kramer had paid $44 for the sink. Silva and Hikade approached Kramer outside of the store and asked to speak with him about the sink he had just purchased. As Silva and Hikade moved back into the store with

Kramer, they informed him that there was a problem with the price he had paid for the sink and that they had watched him affix a fake UPC bar code to the sink box. Kramer was combative as Silva and Hikade led him to the loss prevention office in the back of the store and they attempted to take the organizer.

After arriving at the loss prevention office, Kramer stated that he would give Hikade and Silva $1,000 if they did not call the police. When that approach failed to secure his release, Kramer told Hikade and Silva that he was an undercover agent working for Home Depot to check the security system, that they had done a good job, and they should let him go.

Before the police arrived, Hikade and Silva reviewed the contents of the organizer. It contained many receipts, dozens of store credits on orange plastic cards, and organized pages of UPC bar codes, including a blank space corresponding to the sticker that Kramer had placed on the boxed sink, directly below an exact copy of that sticker.

Kramer was charged with burglary (§ 459) and petty theft (§ 484) arising out of his purchase of the sink.[2]

Kramer testified at trial, describing the following course of events. According to Kramer, he went to Home Depot on February 18, 2007, with a man named David Montoya, who owed him $700. Montoya planned to return some insulation so he could obtain the money to pay Kramer.

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[2] The information originally charged Kramer with grand theft of the personal property of Alex Magana related to the insulation that he returned to Home Depot. However, that charge was dismissed before trial.

After Kramer helped Montoya bring the packages of insulation into the store, an employee at the returns desk told them that nine of the packages had to be returned at the special services desk. Montoya asked Kramer to take care of the return at the special services desk, and Montoya left his organizer with Kramer for that purpose, pointing out the relevant order number in it and telling him the order was for Alex Magana and A&M Construction. Montoya then left to take care of the rest of the return at the returns desk.

Comfort assisted Kramer with the return, but instead of asking whether his name was Alex Magana, she simply stated "A&M Construction?" and "Alex Magana?"; Kramer gave her a positive response. According to Kramer, while he was waiting for Comfort to receive the money needed to process the return, Montoya came by, took the organizer from him and went back inside the store to do some shopping. They agreed to meet in the tool department, and Kramer walked over there when he was done with the return. When Montoya met Kramer in the tools department, Montoya was pushing a shopping cart containing a big box, some smaller boxes and the organizer. Because the return of the insulation had netted less than $700, Montoya agreed to buy a drill for Kramer to make up the difference.

Montoya left to move his vehicle, which was going to be towed because it was parked in a loading zone. He instructed Kramer to buy the items in the cart, including the drill, with store credit that was contained in the organizer. Kramer did so, and then was approached by Silva and Hikade as he exited the store. According to Kramer, Silva said, "[Y]our friend switched the tag on the sink . . . . We want to talk about what your friend did."

According to Kramer, he resisted when Silva and Hikade tried to take the organizer from him as they walked to the loss prevention office, because the organizer did not belong to him. Kramer claimed that he offered $1,000 to Silva and Hikade only in response to one of their statements, "Are you willing to cooperate? Do you want to make things easier on yourself? Maybe we don't have to call the police. . . . I think you know what we want." Kramer denied claiming that he was an undercover investigator for Home Depot.

Kramer testified that Silva falsely accused him because of Silva's animosity toward him from two previous interactions, which Kramer described. Further, Kramer testified that there was a "conspiracy" against him in that Silva, who was the more senior employee, must have instructed Hikade to falsely accuse him as well.

Several other witnesses testified on behalf of the defense, including (1) a handwriting expert, who testified that none of the writing in the organizer matched Kramer's handwriting; (2) a man, John Cobb, who sued Home Depot to recover for an injury allegedly inflicted by Silva; and (3) a private investigator, William De Rose, who attempted to recreate how long it would have taken Kramer to travel through Home Depot and complete the acts he was accused of performing.

The jury convicted Kramer of burglary (§ 459) and petty theft (§ 484), and the trial court sentenced Kramer to three years formal probation with 120 days in local custody.

## II

## DISCUSSION

### A. *The Trial Court Did Not Abuse Its Discretion in Admitting Testimony That Kramer Claimed His Name Was Alex Magana with A&M Construction*

Kramer first contends that the trial court prejudicially erred by denying his motion in limine to exclude testimony that he claimed to be Alex Magana with A&M Construction when returning the insulation at the special services desk.

Defense counsel sought to have the evidence excluded under Evidence Code section 352, arguing that the evidence was prejudicial in that it incorrectly implied a fraudulent transaction, and that it lacked any probative value with respect to the burglary and theft charges. Defense counsel pointed out that there was no evidence that the return of the insulation was unauthorized, and he represented that Mr. Magana had written a letter stating that he was not the victim of any theft and was not missing any insulation.[3] The prosecution argued for the admission of the evidence, contending that Kramer's false representation about his identity was relevant because it showed his dishonest state of mind when he entered the store, which was relevant to the burglary charge.[4]

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3 Although Kramer's appellate briefing presents the issue as whether the trial court should have excluded *all* evidence of the transaction in which Kramer returned the insulation, the record is clear that (1) defense counsel sought only exclusion of testimony concerning Kramer's claim that he was Alex Magana with A&M Construction; and (2) defense counsel acknowledged that other portions of the return transaction were relevant.

4 To obtain a conviction for burglary, the prosecution is required to prove an entry into the store "with intent to commit grand or petit larceny or any felony." (§ 459.)

The trial court denied the motion to exclude. It explained that the evidence had "clear probative value" and was "relevant" as "circumstantial evidence of intent." The trial court also explained that Kramer would not be "inappropriately" prejudiced by the admission of the evidence.

Pursuant to Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."[5] In determining the relevance of evidence and whether it should be excluded as unduly prejudicial, confusing or misleading under Evidence Code section 352, the trial court is vested with broad discretion, and we will reverse only if the trial court has abused its discretion. (*People v. Harris* (2005) 37 Cal.4th 310, 337; *People v. Jordon* (1986) 42 Cal.3d 308, 316.)

Applying the above standard, we conclude that the trial court did not abuse its discretion by admitting evidence that Kramer claimed his name was Alex Magana with A&M Construction. Kramer's supplying a false name was probative because (1) it was evidence of his state of mind when he entered the store; and (2) it was relevant to Kramer's credibility, which the jury was required to assess when Kramer testified at trial

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5 "'Relevant evidence'" is evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

and contradicted the events described by Hikade and Silva.[6] Also, because there was no evidence Kramer broke the law or harmed anyone by lying to Comfort about his name, the trial court could reasonably conclude that the evidence was not unduly prejudicial because it would not evoke a strong emotional bias against Kramer. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 134 [the prejudice referred to in Evid. Code, § 352 is characterized by "evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues"].) Accordingly, the trial court was well within its discretion to decide that the evidence should not be excluded as unduly prejudicial under Evidence Code section 352.[7]

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6 For the first time on appeal, Kramer argues that the evidence at issue should have been excluded pursuant to Evidence Code section 1101, subdivision (a), which provides that evidence of a person's character in the form of opinion, reputation, or specific instances of conduct is inadmissible to prove his or her conduct on a specified occasion. Kramer did not raise such an objection at trial, and thus we need not consider it on appeal. (*People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7 ["It is, of course, 'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.'"]; see also Evid. Code, § 353, subd. (a).) Even if we were to consider the issue, we would conclude Evidence Code section 1101 does not bar the admission of the evidence. Evidence Code section 1101, subdivision (c) states that "[n]othing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." Here, the evidence is relevant to Kramer's credibility.

7 During the trial, the court also exercised its discretion under Evidence Code section 352 to exclude defense witness Peter Griffin from testifying. Griffin is a private investigator who was going to testify about how long it took him to perform a return of merchandise at a different Home Depot store. Kramer mentions the ruling in the argument section of his brief, but he presents no argument that the trial court's ruling under Evidence Code section 352 was an abuse of discretion. Therefore, we do not address the issue. (*People v. Hardy* (1992) 2 Cal.4th 86, 150 (*Hardy*) [declining to address issue presented by appellant without "either argument or citation to relevant authority"].)

B. *The Trial Court Did Not Abuse Its Discretion in Denying Kramer's Motion in Limine to Exclude the Contents of the Organizer*

We next consider Kramer's argument that the trial court prejudicially erred in denying his motion to exclude the contents of the organizer on the basis that the prosecution had violated its obligation to timely disclose relevant evidence.

At the in limine hearing, held on December 11, 2007, defense counsel explained that he had obtained access to the organizer around June 2007 and made photocopies of it. Those photocopies were used by a handwriting examiner on behalf of the defense to produce a report. After the initial examination, defense counsel determined that he needed to look at the organizer again, and he attempted to get access to it through telephone calls to the prosecutor assigned to the case in October and November 2007. He was unsuccessful in obtaining the organizer until December 10, 2007, which was the day before the in limine hearing. Defense counsel argued that the contents of the organizer should be excluded as a sanction for the prosecution's obligation to disclose evidence no later than 30 days prior to trial. (§§ 1054.1, 1054.7.)

The trial court denied the motion, setting forth three bases for its ruling: (1) there was no violation of the prosecution's discovery obligations; (2) in any event, Kramer had not been prejudiced in that he had access to the organizer several months earlier, and again obtained access to it before trial started and several days before the defense would

begin to put on its evidence;[8] and (3) because the contents of the organizer had "clear probative value," it would not apply the sanction of excluding evidence even if there was a discovery violation.

We begin our analysis with the relevant statutes detailing the prosecution's discovery obligations. According to section 1054.1, "[t]he prosecuting attorney shall disclose to the defendant or his or her attorney" "[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged." (§ 1054.1, subd. (c).) The deadline for the disclosures required by section 1054.1 is 30 days prior to trial, unless good cause is shown for an exception. (§ 1054.7.) If a party makes an informal request for compliance with the statutory discovery requirements, and discovery is nevertheless withheld, "a court may make any order necessary to enforce the [discovery] provisions . . . , including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." (§ 1054.5, subd. (b).)

We review the trial court's ruling on a discovery motion to determine whether it abused its discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1232.) We will find an abuse of discretion only if the trial court exercised its discretion in "'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Sanders* (1995) 11 Cal.4th 475, 512.)

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8 Defense counsel obtained access to the organizer for a second time on December 10, 2007. Trial began on December 12, and the defense opened its case on December 14.

Here, we conclude that the trial court exercised its discretion in a reasonable manner, supported by the three separate reasons that it specified. First, the trial court could reasonably conclude that because defense counsel had been given meaningful access to the organizer around June 2007, and again had been given access to the organizer shortly before trial, the prosecution had in fact complied with its obligations under section 1054.1 to disclose the organizer. Second, the trial court could reasonably conclude that there was no basis for a discovery sanction because Kramer had not established prejudice. Although Kramer now contends in his appellate reply brief that he was prejudiced because he could not "properly investigate and develop witnesses in support of the claimed involvement of David Montoya" without access to the organizer, he did not claim prejudice on that basis to the trial court. Indeed, according to our review of the transcript of the in limine hearing, defense counsel did not successfully articulate to the trial court *any* basis for a finding of prejudice. Third, the trial court was within its discretion to conclude that even if there was a discovery violation, it would not choose to impose the sanction of excluding the contents of the organizer, as requested by Kramer, because that evidence had clear probative value in the case. (See *People v. Ayala* (2000) 23 Cal.4th 225, 299 ["'a trial court may, in the exercise of its discretion, "consider a wide range of sanctions" in response to the prosecution's violation of a discovery order'"].)

C. *The Trial Court Did Not Err in Sustaining Hearsay Objections to Questions About Whether Silva Lied in Prior Court Proceedings*

Defense witness Cobb testified about a lawsuit that he filed against Silva. The trial court sustained a series of hearsay objections to questions designed to elicit Cobb's

testimony that Silva had lied during his deposition and trial testimony in Cobb's lawsuit.[9] The trial court did, however permit Cobb to testify that according to the content of Silva's testimony, Cobb's "observation of the event was different" from Silva's, that there was "a difference between" Cobb's testimony and Silva's testimony, and that Cobb testified truthfully.

Kramer challenges the trial court's rulings on the hearsay objections. Kramer does not dispute that defense counsel's questions called for "hearsay evidence" as that term is statutorily defined. (Evid. Code, § 1200.) Nor, does he cite any exception to the hearsay rule that he contends is applicable. (*Id.*, §§ 1220-1380.) Instead, Kramer contends that the evidence is admissible under Evidence Code sections 780[10] and 1103.[11] (Evid.

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9 Specifically, the trial court sustained objections to the following questions: "Did he describe [the interaction] accurately?"; "Was he truthful in his testimony?"; "Did Mr. Silva describe the incident the same as you had described the incident?"; "Do you personally know Mr. Silva to have testified falsely . . . ?"; "Based on . . . watching him testify in a deposition . . . and then also in a trial, do you have an opinion as to whether Mr. Silva is an honest person?"; and "Which description was accurate between yours and Mr. Silva's?"

10 Evidence Code section 780 states that "[e]xcept as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to . . . [¶] . . . [¶] (e) His character for honesty or veracity or their opposites."

11 Evidence Code section 1103 provides that, under certain circumstances, evidence of the character or trait of character of a victim of crime is admissible notwithstanding that the evidence would otherwise be inadmissible under Evidence Code section 1101. Evidence Code section 1101, in turn, provides, with certain exceptions, that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is

Code, § 1103, subd. (a).) On their face, neither of these provisions purport to function as an exception to the hearsay rule. Accordingly, Kramer has presented no basis for us to conclude that the trial court erred in sustaining the hearsay objections.

Further, even if Kramer had established error, that error would not be prejudicial. As we have explained, despite the evidentiary rulings at issue here, the trial court permitted Cobb to respond to questions which resulted in Cobb nevertheless communicating to the jury that he believed Silva was untruthful in his testimony.

D. *The Trial Court Did Not Prejudicially Err by Sustaining Hearsay Objections to Questions About What Silva Said to Kramer During a Previous Interaction*

Kramer contends that the trial court erred in sustaining hearsay objections during his own testimony about comments that Silva made to him during their two previous interactions.

According to Kramer, his first interaction with Silva was at a Home Depot store when he confronted Silva after seeing Silva yelling at a man and dumping the contents of the man's backpack on the ground. The trial court sustained hearsay objections to questions about what Kramer heard Silva saying to the man and what Silva said to Kramer. The trial court did, however, permit Kramer to testify that Silva's tone of speech was very aggressive, abusive and inappropriate toward the man, and that Silva spoke to Kramer in a very hostile manner.

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inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).)

Kramer testified that his second interaction with Silva occurred three or four weeks later as he exited a Home Depot store after buying clearance items. Silva approached Kramer, grabbed his arm, pushed him against a wall, said something about a receipt and made a threatening comment. After obtaining the receipt from Kramer and investigating the matter, Silva threw the crumpled receipt at Kramer and let him leave. The trial court sustained hearsay objections to the specific content of Silva's remarks to Kramer during the incident.

Kramer presents a brief and undeveloped argument that the trial court erred by sustaining the hearsay objections. His entire argument consists of the assertion, without authority, that "[t]his evidence was not offered to prove the truth of the matter stated, but to illustrate Silva's biased, hostile attitude toward [Kramer]." Because Kramer cites no authority in support of his argument and does not develop it, we need not consider it. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [court may decline to consider an argument made without citation to authorities]; *Hardy, supra,* 2 Cal.4th at p. 150 [declining to address issue presented by appellant without "either argument or citation to relevant authority"].)

Even if we were to consider the argument and find error, we would conclude that it is not prejudicial. According to Kramer, the excluded evidence was important because it would show Silva's hostility toward him prior to the instant offense. Although the exact content of Silva's statements to Kramer were excluded, Silva's hostility was thoroughly established by Kramer's testimony that Silva spoke in an aggressive, abusive, hostile and inappropriate manner, that he made a threatening comment, that he grabbed

Kramer's arm and pushed him against a wall, and that he let Kramer leave only after throwing a crumpled receipt at him.

E. *Claims of Instructional Error*

Kramer contends that the trial court prejudicially erred by instructing the jury with CALCRIM Nos. 361 and 362. We apply a de novo standard of review to assertions of instructional error. (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469 (*Lamer*).)

1. *CALCRIM No. 361*

Over the objection of defense counsel, the trial court instructed the jury with CALCRIM No. 361.

CALCRIM No. 361, as given to the jury, provides: "If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure." CALCRIM No. 361 is similar in content to CALJIC No. 2.62, and thus we may rely on case law discussing that instruction in reviewing Kramer's claim of error. (See *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1066.)[12]

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12 CALJIC No. 2.62 reads: "In this case defendant has testified to certain matters. [¶] If you find that [a][the] defendant failed to explain or deny any evidence against [him][her] introduced by the prosecution which [he][she] can reasonably be expected to

"'"It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference."'" (*Lamer, supra*, 110 Cal.App.4th at p. 1469.) Based on this principle, case law holds that a trial court may instruct with CALJIC No. 2.62 only if the "defendant . . . failed to explain or deny any fact of evidence that was within the scope of relevant cross-examination." (*People v. Saddler* (1979) 24 Cal.3d 671, 682 (*Saddler*).) "A contradiction between the defendant's testimony and other witnesses' testimony does not constitute a failure to deny which justifies giving the instruction." (*Lamer*, at p. 1469.) "Appellate courts have frequently warned that trial courts should carefully consider whether CALJIC No. 2.62 should be given." (*Lamer*, at pp. 1469, 1470, citing *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1119-1120, and *People v. Marks* (1988) 45 Cal.3d 1335, 1346.)

Kramer contends that he did not fail to deny or explain any evidence within the scope of cross-examination, and that the trial court therefore erred in instructing with CALCRIM No. 361. We agree. Kramer's detailed testimony about what he contends actually occurred in Home Depot, and his testimony that Silva and Hikade conspired to

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deny or explain because of facts within [his][her] knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against [him][her] does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that [he][she] would need to deny or to explain evidence against [him,][her,] it would be unreasonable to draw an inference unfavorable to [him][her] because of [his][her] failure to deny or explain this evidence."

falsely accuse him, provided an explanation for all the prosecution's evidence against him. Thus, it was error for the trial court to instruct with CALCRIM No. 361.

However, as we will explain, we find the error to be harmless under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *Saddler*, *supra*, 24 Cal.3d at p. 683 [applying *Watson* harmless error standard when the trial court improperly instructed with CALJIC No. 2.62].) First, we note that the content of CALCRIM No. 361 itself contains several elements that reduce the risk that any prejudice to the defendant will result when it is improperly given: (1) it does not direct the jury to draw an adverse inference, but states only that in the event the defendant has failed to explain or deny evidence, that fact may be used in evaluating the evidence; (2) it cautions the jury that the failure to deny or explain evidence does not create a presumption of guilt and does not alone prove guilt; and (3) it makes clear, favorably to the defense, that the prosecution has the burden of proof of each element of the crime beyond a reasonable doubt. (See *Lamer*, *supra*, 110 Cal.App.4th at pp. 1472-1473 [observing that these same characteristics of CALJIC No. 2.62 contributed to the harmless nature of the error in giving that instruction].)

Second, in determining that the error was not prejudicial, it is significant that the jury was instructed pursuant to CALCRIM No. 200 that "[s]ome of these instructions may not apply," and that they should "follow the instructions that do apply to the facts as you find them." (*Ibid.*; see *Saddler*, *supra*, 24 Cal.3d at p. 684 [error was not prejudicial, in part, because the jury was instructed under CALJIC No. 17.31 "that they were to 'disregard any instruction which applies to a state of facts which you determine does not

exist'"].) Because Kramer did not fail to deny or explain any evidence, it is likely that the jury would have concluded that CALCRIM No. 361 did not apply.

Finally, the evidence against Kramer was strong, based on the testimony of two eyewitnesses who saw him apply a fake UPC bar code sticker to the box containing the sink.

We accordingly conclude that it is not reasonably probable that a result more favorable to Kramer would have been reached had the jury not been instructed with CALCRIM No. 361.

2. *CALCRIM No. 362*

The trial court instructed the jury with CALCRIM No. 362, which states, as given here:

> "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Kramer contends that this instruction was error because there was no foundational finding by the trial court that Kramer made a false or misleading statement relating to the charged crime. This contention lacks merit.

Both Hikade and Silva testified that Kramer made a false statement to them in which he attempted to explain his actions by claiming to be an agent working undercover for Home Depot.[13] Therefore, the trial court properly gave CALCRIM No. 362.

F. *Kramer Has Not Established Ineffective Assistance of Counsel*

Kramer contends that his conviction should be reversed on the ground that defense counsel provided ineffective assistance.

We begin by summarizing the standards applicable to a claim of ineffective assistance of counsel. "Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) That right "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*Ibid.*) A defendant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *Ledesma*, at pp. 216, 218.) Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

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13 We note that defense counsel did not object to the trial court instructing the jury with CALCRIM No. 362. However, because we resolve the issue on the merits, we need not address the Attorney General's contention that defense counsel's failure to object to the instruction in the trial court constitutes a forfeiture of the issue on appeal.

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.)

Further, "[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions." (*People v. Lucas* (1995) 12 Cal.4th 415, 442 (*Lucas*); see also *People v. Anderson* (2001) 25 Cal.4th 543, 569 (*Anderson*) ["When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation."].)

Kramer relies on two situations that arose during trial to support his argument that he received ineffective assistance of counsel. We consider each instance in turn, applying the standards set forth above.

1. *Testimony of De Rose*

The defense called private investigator De Rose as a witness. De Rose was hired by defense counsel to retrace Kramer's alleged path in Home Depot to determine how long it would take, and in doing so he obtained receipts containing time stamps. De Rose prepared a report, which defense counsel provided to the prosecution.

During cross-examination, the prosecutor showed De Rose a copy of the report. De Rose remarked, "Yours doesn't look like mine. It seems like it has been cut and pasted." In the presence of the jury, the prosecutor stated, "That is what I received from defense counsel. Are you telling me you wrote something different?" De Rose later reiterated, "There is some stuff missing here. . . . There is some verbiage missing here."

The trial court called a recess to discuss the matter with counsel. Defense counsel explained that he had redacted some of De Rose's report before providing it to the prosecution because the redacted portions dealt with the subject of how long it took to complete a return, which he did not intend to cover during De Rose's testimony, and for which he would be offering a different witness. However, on the day of De Rose's testimony he changed his mind, but forgot that he had redacted the report and thus did not provide an unredacted report to the prosecution.

The trial court ruled that defense counsel had violated his discovery obligations under section 1054.5. Because the prosecution had not obtained the portion of De Rose's report that discussed the receipts he received during his investigation, the trial court instructed the jury that in considering De Rose's testimony, it was to disregard "[a]ny reference to the receipts themselves," and that those receipts "will not be received as evidence," but that the jury may give "whatever weight it deems necessary . . . to the balance of" De Rose's testimony.

In an undeveloped and cursory argument, Kramer contends that defense counsel provided ineffective assistance of counsel with regard to De Rose's testimony because "the jury was left with a clear and unmistakable impression that [Kramer] had tampered with evidence in the case."[14]

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14 In his reply brief, Kramer makes a completely different argument. He contends that because of counsel's error, the jury was not able to consider crucial evidence from De Rose about how long it took him to recreate Kramer's movements in Home Depot. This argument is meritless because the trial court did *not* instruct the jury to disregard De Rose's testimony about how long it took him to recreate Kramer's movements. On the

We conclude that Kramer has not established ineffective assistance of counsel because he cannot establish "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, 466 U.S. at p. 694.) Contrary to Kramer's assertion, we do not believe that the comments that the jury heard about De Rose's report implied that Kramer himself had tampered with the evidence. Instead, the prosecutor specifically mentioned that it was *defense counsel* that had provided a different version of the report to him. Further, as we have already discussed, the evidence of Kramer's guilt was strong.

2. *Motion to Reopen the Defense Case*

After the defense rested its case and the parties had finished discussing jury instructions with the trial court, defense counsel moved to reopen the defense case to present the testimony of another witness, Dan Ervin. From defense counsel's description, it appears that Ervin was an employee of Home Depot until the end of 2006, and he would testify that while in the loss prevention office at the El Cajon store, he had seen security video monitors showing portions of the store through which Kramer allegedly traveled.[15] The trial court denied the request to reopen the defense's case, explaining that

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contrary, the trial court narrowly instructed the jury that it was to disregard any reference to the "receipts themselves," and that those receipts would not be received as evidence.

[15] Hikade explained during his testimony that Home Depot had 32 operative security cameras in the El Cajon store, most of which were focused on the registers and exits, and although Kramer was captured on video as he made his purchase and walked out of the door, he was not recorded while selecting items in the store or placing the sticker on the boxed sink.

the request to call Ervin was untimely and that the testimony, as described, had minimal probative value in that the witness (1) was not working at Home Depot in February 2007 when the charged crimes took place; and (2) had only a brief involvement with the security video monitors.

In a cursory argument, made without any citation to authority, Kramer contends that defense counsel offered ineffective assistance because he did not "announce[] his intention to call the witness before submitting the matter."

We reject Kramer's argument. As we have explained, when the record on appeal does not disclose the reason for defense counsel's actions, we will reverse based on a claim of ineffective assistance of counsel "only if the record on appeal demonstrates there could be no rational tactical purpose" (*Lucas*, *supra*, 12 Cal.4th at p. 442) or "satisfactory explanation" for counsel's omissions (*Anderson*, *supra*, 25 Cal.4th at p. 569). Here, defense counsel did not explain why he failed to offer Ervin's testimony before he rested his case. One rational and satisfactory explanation would be that defense counsel had not been able to contact Ervin or believed Ervin would not be available to testify, but then learned after the close of evidence that Ervin was available. Therefore, we conclude that defense counsel's failure to present Ervin's testimony before the close of evidence does not provide a ground for reversal.

Further, Kramer has not established a reasonable probability that, but for the omission, the result of the proceeding would have been different. (*Strickland*, *supra*, 466 U.S. at p. 694.) As the trial court explained in denying the motion to reopen, Ervin's testimony would have little probative value because he was not employed during the

relevant time period and appears to have had limited involvement with the security video monitors. Further, as we have previously noted, the evidence against Kramer was strong.

G. S*ufficient Evidence Supports the Conviction for Petty Theft*

Kramer's final contention is that insufficient evidence supports his conviction for petty theft. (§ 484.)

We review the sufficiency of the evidence by determining "'"whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'" (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1440.)

Kramer was charged with petty theft in violation of section 484, subdivision (a), which states that "[e]very person who shall feloniously steal, take, carry, lead, or drive away the personal property of another . . . is guilty of theft." "Theft" in section 484 covers several distinct offenses, including larceny, theft by false pretenses and theft by trick. (*People v. Davis* (1998) 19 Cal.4th 301, 304 (*Davis*); *People v. Traster* (2003) 111 Cal.App.4th 1377, 1389 (*Traster*); *People v. Ashley* (1954) 42 Cal.2d 246, 258 (*Ashley*).) Regardless of the type of theft under which the jury is instructed, a verdict of theft will be affirmed if sufficient evidence supports a finding of theft under *any* theory of theft. (*Traster*, at pp. 1389-1390 & fn. 32; *Ashley*, at p. 258.)

Here, the trial court instructed the jury under the theory of theft by trick. "The elements of theft by trick and device are: '(1) the obtaining of the possession of the property of another by some trick or device; (2) the intent by the person so obtaining possession to convert it to his own use and to permanently deprive the owner of it; and

(3) that the owner, although parting with possession to such person, does not intend to transfer his title to that person.'" (*Traster*, *supra*, 111 Cal.App.4th at p. 1390.)

As Kramer properly points out, however, theft by trick is not applicable here, as it only applies when the owner does not intend to transfer *title*, but only intends to transfer *possession*. The applicable species of theft here is theft by false pretenses. "Although the crimes of larceny by trick . . . and obtaining property by false pretenses are much alike, they are aimed at different criminal acquisitive techniques. Larceny by trick . . . is the appropriation of property, the possession of which was fraudulently acquired; obtaining property by false pretenses is the fraudulent or deceitful acquisition of *both title and possession*." (*Ashley*, *supra*, 42 Cal.2d at p. 258, italics added.) Thus, because the applicable species of theft in this case is theft by false pretenses, we will examine whether the record contains sufficient evidence of that offense.

"A theft conviction on the theory of false pretenses requires proof that (1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation." (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842.) "[R]eliance means that the false representation 'materially influenced' the owner's decision to part with his property . . . . A victim does not rely on a false representation if 'there is no causal connection shown between the [representations] alleged to be false' and the transfer of property." (*Id*. at pp. 1842-1843, citation omitted.)

Here, the first two elements are indisputably supported by the evidence because the fake UPC bar code sticker was a false pretense or representation that Kramer employed with the intent to defraud Home Depot of the sink at an incorrect price. However, Kramer contends that insufficient evidence supports a finding on the third element, namely, that Home Depot *relied* on the false UPC bar code sticker in making the sale. Kramer contends that because Hikade and Silva, as agents of Home Depot, watched as he applied the fake UPC bar code sticker to the boxed sink and nevertheless permitted him to purchase the sink, the element of reliance has not been established. Kramer argues that without the necessary element of reliance, the evidence supports no more than a conviction for *attempted* theft by false pretense. (See *People v. Fujita* (1974) 43 Cal.App.3d 454, 467 [the offense of attempted theft by false pretense does not require the element of reliance].)

Kramer premises his argument on *People v. Lorenzo* (1976) 64 Cal.App.3d Supp. 43 (*Lorenzo*), in which a supermarket manager observed the defendant switch price tags from one kind of glove to another kind of glove and to switch price tags placed on chickens, and then waited to apprehend the defendant until after he purchased the items and exited the store. (*Id*. at p. Supp. 45.) *Lorenzo* held that the defendant's conviction on a theory of theft by false pretenses must be reduced to a conviction of attempted theft by false pretenses because the prosecution had not established the necessary element of reliance on the false representation. (*Id*. at p. Supp. 47.) *Lorenzo* explained, "The manager of the market at all times was aware that defendant had switched the price labels and merely allowed defendant apparently to consummate his scheme in order to be able

to arrest him in the parking lot. The manager at no time relied upon defendant's conduct." (*Ibid.*)[16]

We find *Lorenzo* to be factually distinguishable. In *Lorenzo*, the supermarket manager observed the defendant switching tags by taking them from what the manager knew to be lower priced items and placing them on higher priced items. (*Lorenzo*, *supra*, 64 Cal.App.3d Supp. at p. 45.) Therefore, the manager knew that the defendant had falsely made a representation that the price of the items was lower than the store intended to sell them for, but he nevertheless allowed the defendant to purchase them. Here, in contrast, Hikade and Silva merely observed at a distance as Kramer took a sticker from the organizer and placed it on the boxed sink. They did not know what was printed on the sticker, and thus did not know until Kramer completed the purchase and they looked at the duplicate receipt that Kramer had made a false representation to the cashier that would cause the store to sell the sink a reduced price. Indeed, both Hikade and Silva testified that their purpose in looking at the duplicate receipt was to determine whether Kramer had paid the correct price for the sink. Because Hikade and Silva did not know before Kramer purchased the sink that he had made a false representation about the price

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16 The Attorney General contends that *Davis, supra,* 19 Cal.4th 301, controls the issue of whether insufficient evidence supports the petty theft conviction. We disagree. *Davis* held that a conviction for theft by larceny, rather than attempted theft, occurs when a defendant takes merchandise off of the rack in a store and presents it in the store for a return as if he had already purchased the item. (*Id*. at pp. 317-318.) *Davis* did not deal with the offense of theft by false pretenses (*id*. at p. 318, fn. 14) and thus did not consider the element of reliance, which is the issue here.

of the item, the evidence amply supports a finding that Home Depot relied on Kramer's false representation in passing title of the sink to him.[17]

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

MCCONNELL, P. J.

NARES, J.

[17] Kramer also makes a cursory argument that defense counsel offered ineffective assistance because he did not request a jury instruction on attempted theft. We reject that argument because counsel may have had a tactical reason for failing to do so, in that one of his points in closing argument was that the jury should not convict on the theft count in that it was "not a completed theft" because Hikade and Silva "weren't fooled at all." (*Lucas, supra,* 12 Cal.4th at p. 442 [reversal based on ineffective assistance of counsel warranted only if "there could be no rational tactical purpose for counsel's omissions"].)